SUNDRAM PROPERTIES SDN. BHD.

v.

CYRIL WETTASINGHE & ORS.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 2117 OF 1985]
8 SEPTEMBER 1986

COMPANY LAW: *Procedure - Use of company's name in legal proceedings by persons not registered shareholders of the company - 1st and 2nd defendants filed summons to strike out service of writ and the writ itself - Also to set aside order of stay of execution of the order of sale - Whether the writ should be struck out - Whether order of stay of execution should be set aside.*

This was an application by way of summons by the 1st and 2nd defendants for the service of the writ and the writ itself to be struck out and the order of stay of execution of the order of the sale to be set aside.

The plaintiff's claim was for a declaration that the charge of the plaintiff's two pieces of land to the 1st defendant was void; an injunction in connection therewith; and stay of execution of the order of sale of the charged land made by the 3rd defendant.

On 14 January 1986 the 3rd defendant applied by way of summons for the writ against the 3rd defendant to be struck out on the ground that a wrong party had been sued and that the State Director of Lands and Mines, by virtue of s. 16(2) of the National Land Code, should have been sued instead. By consent, the action against the 3rd defendant was discontinued.

Held:

[1] A beneficiary of shares in a company, registered in the name of another person as trustee, has no rights in such company and any relations which the trustees has with the beneficiary are matters with which such company has nothing whatever to do.

[2] It is open to any party who is adversely affected by the use of the company's name in an action to challenge the authority for using the company's name in such action.

[3] Subject to a few exceptions, a company is the proper plaintiff when an allegedly wrongful act is done to it, and that no individual member of the company is allowed to sue **for** the company where the said act could have been rendered harmless or approved, or made binding on the company, by a simple majority of shareholders. The exceptions to this rule are first, when the said act is *ultra vires* the company or is illegal; secondly , when the said act is a fraud against the minority and the wrong-doers are in control of the company; and, thirdly, when the said act requires the approval of a specific majority.

[4] For the reasons stated above, the instant proceedings having been filed by persons who were not even registered shareholders but beneficial owners (as they claimed to be), it was filed without authority and was irregular.

[Writ set aside. Order of stay of execution of the order of sale discharged.]

Cases referred to:
West End Hostels v. Bayer [1912] (xxix) TLR 92
Daimler Company Ltd. v. Continental Tyre [1916] 2 AC 307
Re Perkins, ex p. Mexican Santa Babara Mining Co. [1890] 24 QB 613
Heyting v. Duport [1964] WLR 843

Legislation referred to:
Companies Act 1965, s. 163(4)
Companies Act [UK], s. 117
National Land Code, s. 16(2)
Rules of the High Court 1980, O. 15, r. 12

For the plaintiff - Gurbachan Singh; M/s. Bachan & Kartar
For the 1st & 2nd defendants - Lock May Choon; M/s. Mariadass, Lock & Ainuddin
For the 3rd defendant - Ariffin, State Legal Adviser

JUDGMENT

Peh Swee Chin J:

Once again, certain litigants involved in the present case, found themselves entrapped in the confusion of procedural technicalities relating to the use of a company's name in legal proceedings, thereby causing the instant proceedings to be aborted.

A brief summary of the background would make for a better understanding of the issues involved.

The sole plaintiff, (the said company), is a company incorporated under the Companies Act 1965. Prior to 13 February 1984, its issued capital was undoubtedly owned by one Sundram s/o Malarun and his wife called Kanakammah d/o Naidu; (hereinafter called the said husband and wife). On 13 February 1984, they, of the one part, entered into an agreement with two other parties, of the other part, viz., Tapah Maju Sdn. Bhd. and Joginder Singh s/o Bagawan Singh (hereinafter called the said two parties), to sell their entire shareholdings to the said two parties. Under the terms of the agreement, the said husband and wife, as directors of the company, agreed to procure approval of the board of directors of the said company for the sale of their entire shares and the appointment of the said two parties' representatives to the board of directors in place of the said husband and wife. Disputes soon arose between the contracting parties so that the said two parties filed a civil suit, (not the present suit), in High Court, Ipoh, for specific performance of the said agreement, and in the meantime, *inter alia*, the appointment of the new directors, had never been implemented for the benefit of the said two parties. The net result is that, at all material times, the said two parties' names had not appeared on the register of members of the said company, neither their representatives nor nominees had been appointed as new directors of the said company. Such was the state of the parties when the present civil suit was filed with the said company's name being used as the sole plaintiff. I will now refer to the nature of the instant civil suit.

In the present civil suit, the plaintiff, as the registered proprietor of two pieces of land charged to the 1st defendant, asked for a declaration that the charge was void; an injunction in connection therewith; stay of execution of the order of sale of the charged lands made by the 3rd defendant; however, with no relief being sought against 2nd defendant, an advocate and solicitor acting for the 1st defendant. On 27 November 1985, the plaintiff obtained an order of stay of execution of the order of sale made earlier at the instance of the 1st defendant as chargee. I will now refer to the events leading to the order finally made by this Court.

On 14 January 1986, the learned State Legal Adviser of Perak filed a summons for the writ against 3rd defendant to be struck out on the ground that a wrong party had been sued and that the State Director of Lands and Mines, by vitue of s. 16(2) of the National Land Code, should have been sued instead. By consent, the action against the 3rd defendant was discontinued.

The 1st and 2nd defendant then filed their summons also on 4 January 1986 for the service of the writ and the writ itself to be struck out and the order of stay of execution of the order of sale to be set aside. From the supporting affidavit, it was stated that the present civil suit was filed without authority; to the effect that it was filed at the instance of Palanisamy s/o Seenimalai Gounder, purportedly on behalf of the said two parties who had filed the other civil suit for specific performance mentioned above, and that the said two parties had no *locus standi* to file the present action.

In an affidavit of reply from the said Palanisamy s/o Seenimalai Gounder, it was admitted that the said two parties had not yet been registered as shareholders but it was further stated that the said two parties were "benefical and equitable shareholders" of the company who had also filed the other civil suit against vendors of the shares. The only persons who could challenge the authority of the said two parties in filing the instant action would be those vendors; to the effect, that the said two parties were the actual aggrieved parties in regard to the order of sale of the charged lands; that the question as to who were the actual shareholders would be decided in that other civil suit; that the *status quo* should be maintained; that the sub-purchasers of the two pieces of the charged land, altogether 52 persons, would be adversely affected by the said order of sale and that the previous shareholders, (the vendors), had sufficient *locus standi* to maintain this action.

Before me, learned Counsel for the 1st and 2nd defendants submitted to the effect that the beneficial interest of the said two parties were subject to dispute; that by Article 10 of the articles of association of the said company, the said company was not bound, except by an order of Court, to recognize any equitable interest. Search of the company register, kept by the Registrar of Companies, it was submitted to the effect, showed that the said Palanisamy or any of the said two parties was not a director of the said company. He cited *West End Hotels v. Bayer* [1912] (xxix) TLR 92 and *Daimler Company Ltd. v. Continental Typre* [1916] 2 AC 307. He submitted that the present proceedings were irregular and should be struck out.

Learned Counsel for the plaintiff submitted to the effect that such summary procedure of striking out should be employed only in very plain cases; that the said Article 10 also recognized an order of Court, that the issue of ownership of share remained to be solved; that the 52 sub-purchasers would suffer; that only the nominal shareholders, (i.e., the vendors), could challenge the authority for instituting this present action, but they had been restrained from dealing with the said company by an order made in other pending civil suit; that the cases cited were distinguishable because plaintiffs and defendants in all these cases were fellow-directors.

Learned Counsel for the 1st and 2nd defendants submitted further to the effect that only persons who could take action were the majority of shareholders and that the said Palanisamy had no authority to claim to be the managing director of the said company.

It would be desirable to dispose of the contention about the said two parties being beneficial owners. The claim of entitlement by beneficial owners of shares to bring action in the company's name would meet with an immovable obstruction in the form of s. 163(4) of the Companies Act 1965 in the following words:

> Section 163.
> (4) Except as provided in the section no notice of any trust expressed implied or constructive shall be entered on a register or branch register or be receivable by the Registrar and no liabilities shall be affected by anything done in pursuance of subsection (1), (2) or (3) or pursuant to the law of any other place which corresponds to this section and the corporation concerned shall not be affected with notice of any trust by anything so done.

This section's counterpart in England, *viz.* s. 117 of the Companies Act of England, has been repeatedly and judicially interpreted to mean that a beneficiary of shares in a company, registered in the name of another person as trustee, has no rights in such company and any relations which the trustee has with the beneficiary are matters with which such company has nothing whatever to do, (*vide* e.g., *Re Perkins, ex p. Mexican Santa Babara Mining Co.* [1890] 24 QB 613). Apart from this, the articles of association of the company as was submitted in this case, even expressly provided that the said company could not be compelled to recognize any equitable interest save in obeying an order of Court. I found therefore the contention of beneficial owners of shares being so entitled to be without substance.

Next, it would be more convenient, to deal with another contention of learned Counsel for the plaintiff, which, I can only surmise, appeared to be that only shareholders or directors of a company could challenge the authority for using the company's name in an action, and that outsiders could not do so. My view is that it is open to any party who is adversely affected by such action, to question such authority, irrespective of whether he is a shareholder, or a director, or not at all. I therefore found the contention to be of no avail to the learned Counsel for the plaintiff. If any authority is required for my view, it can be found in the very *Daimler case* mentioned above in which, the defendant/company successfully defended an action for a trade debt from a different company i.e., the plaintiff/company, on the ground that the secretary of the plaintiff/company had no authority to institute the action in the name of plaintiff/company without authority from the directors of the plaintiff/company.

I now deal with the procedural technicalities, the setting out of which would be sufficient to show that the action herein was instituted without authority and was thus irregular. In my judgment, it is quite settled that, although a company is the only proper plaintiff when it seeks redress a wrong done to it or to recover damages and money due to it, the use of company's name, however, in such an action can only and normally be authorised by its directors.

When such authorization by directors is neither possible nor desirable for those conceivable reasons e.g., where the directors are wrong-doers, then in the absence of any provisions in the articles of association to the contrary, the majority shareholders may authorise the use of a company's name in such an action.

If majority shareholders are reluctant to do so, the minority shareholders, may sue in their own names, on behalf of themselves and the other shareholders, under O. 15 r. 12 of the Rules of High Court and may cite the directors or majority shareholders or both, where appropriate, as defendants.

Such minority shareholders' representative action under O. 15 r. 12 must in all cases contain an allegation that they cannot sue in the name of the company because the wrong-doers are in control. However, Plowman J in *Heyting v. Duport* [1964] WLR 843, an important case on this point, held to the effect that if the statement of claim in such a case does not allege facts which will bring the case within one of the exceptions to the rule in *Foss v. Harbottle*, then the Court would have no jurisdiction to hear such a representative action, and even if the defendant does not take this point, the Court would, on its own motion, take it and dismiss such an action. It will be necessary now to discuss briefly about the rule in *Foss v. Harbottle*, as very often happens, one thing leads to another.

For convenience, the rule in *Foss v. Harbottle* can be simply restated as that, subject to a few exceptions, a company is the proper plaintiff when an allegedly wrongful act is done to it, and that no individual member of a company is allowed to sue For the company where the said act could have been rendered harmless or approved, or made binding on the company, by a simple majority of shareholders. In other words; i.e., the majority will would have prevailed over that of the minority.

The exceptions to this rule, are first, when the said act is *ultra vires* the company or is illegal; secondly, when the said act is a fraud against the minority and the wrong-doers are in control of the company; and thirdly when the said act requires the approval of a specific majority, e.g., in the case of a special resolution, but it has been passed only by a simple majority.

The requirement of Plowman J or the consequence for a failure to follow it as stated by Plowman J may be too stringent but it certainly is not necessary to go further into it in the instant case.

It will be obvious from what is stated above, that the instant action having been instituted by persons who were not even registered shareholders but beneficial owners (as they claimed to be), they having failed in their scramble to be on the register of members, or persons who had not yet been appointed as directors, the conclusion was inescapable that it was filed without authority and was irregular.

Before giving judgment, the Court had considered granting leave to amend the writ, but no amendment could have been useful in sustaining this action by the sole plaintiff i.e., the said company, for the benefit of which, the action appeared to have been filed. The Court then discharged the order of stay of execution of the order of sale; set aside the writ, and dismissed the action with costs.

Also found at [1987] 1 CLJ 213